

1997

# Dorena Bankler v. Jack Bankler : Brief of Appellant

Utah Court of Appeals

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SEP

IN THE UTAH COURT OF APPEALS

DORENA BANKLER,	)	
	)	
Plaintiff/Appellee	)	
	)	BRIEF OF APPELLANT
vs.	)	
	)	
JACK BANKLER,	)	Appellate Court No. 970149-CA
	)	Trial Court No. 966500506
Defendant/Appellant	)	

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APPEAL from the Fifth District Court,  
in and for Washington County, Utah,  
Hon. James L. Shumate, Fifth District Court Judge

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ARGUMENT PRIORITY CLASSIFICATION: Rule 29(b)(15), Utah R.App.P.:  
Domestic/Civil matter--appeal from final judgment of dismissal for  
lack of jurisdiction

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I. PARTIES TO THE PROCEEDINGS:

All parties to this proceeding are set forth in the caption of the case.

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#### IV. JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to U.C.A. §78-2a-3(2)(h).

This is a final judgment of dismissal of Appellant's Verified Petition to Modify Decree of Divorce. The lower court initially had jurisdiction over the case pursuant to Appellee's domesticating her entire California Decree of Dissolution in the Fifth District Court in and for Washington County, Utah.



V. STATEMENT OF ISSUES FOR REVIEW

A. ISSUE FOR REVIEW: JURISDICTION OF UTAH COURT AFTER DOMESTICATION OF ENTIRE FOREIGN DECREE

Where Plaintiff, who resides in California, filed in Utah district court and served upon Defendant, her former Husband and Utah resident, a Notice of Entry of Foreign Judgment as to Plaintiff's entire California Decree of Divorce, thereby domesticating her entire California Decree of Divorce in that same Utah district court, and thereupon sought additional equitable relief from that same Utah district court against Defendant, DID THE LOWER COURT ERR in dismissing Defendant's affirmative defense of materially changed circumstances, brought through a Verified Petition to Modify Decree of Divorce, holding that the Court lacked subject matter and personal jurisdiction as to Utah resident's Petition to Modify while holding him responsible for California Plaintiff's claims which arose out of the same fully domesticated Decree?

B. STANDARD OF APPELLATE REVIEW

The Utah cases addressing subject matter jurisdiction are consistent in reviewing the lower court's conclusion of law in

denying subject matter jurisdiction under a CORRECTION OF ERROR standard, and "accord the trial court no particular deference." Burns Chiropractic Clinic v. Allstate Ins. Co., 851 P.2d 1209, 1211 (Utah App. 1993); Barnard v Utah State Bar, 857 P.2d 917 (Utah 1993); Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985); Fauer v. Hanson, 803 P.2d 1275, 1276 (Utah App. 1990); Skokos v. Corradini, 900 P.2d 539, 269 Utah Adv.Rep.11 (Utah App. 1995).

There are no Utah cases directly on point regarding invocation of personal jurisdiction in a contempt action after entry of the entire foreign decree of divorce where defendant consents by actually invoking such jurisdiction herself. The self-evident attachment of personal jurisdiction, at least once subject matter jurisdiction is invoked, may account for that absence of direction, or need for same. However, because the trial court ruled as a matter of law that it had no personal jurisdiction [Order of Dismissal, pp. 1-2], and since the trial court admittedly had difficulty with an issue of first impression [Tr. May 5, 97, p.8: 3-4], Appellant respectfully suggests that the appropriate standard of appellate review on the personal jurisdiction issue should also be the same as the standard of review cited above for subject matter jurisdiction issues, to wit: "correction of error, according the trial court no particular deference."

C. ISSUE PRESERVED IN TRIAL COURT

The issue was preserved in trial court [Record, p. 37] through Appellants "Memorandum of Points and Authorities With Regard To Jurisdiction of a Foreign Decree," and through oral argument [Dec. 13 '96 Tr. 3-8].

VI. CONSTITUTIONAL PROVISIONS AND STATUTES WHOSE INTERPRETATION IS DETERMINATIVE OF THIS APPEAL OR OF CENTRAL IMPORTANCE TO THIS APPEAL

A. CONSTITUTIONAL PROVISIONS:

1. CONSTITUTION OF THE UNITED STATES:

a] Amend V:

No person shall...be deprived of life, liberty, or process, without due process of law.

b] Amend XIV:

...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. CONSTITUTION OF THE STATE OF UTAH:

a] Art. I §7. [Due Process of law].

No person shall be deprived of life, liberty or property, without due process of law.

b] Art. I §11 [Courts open-Redress of Injuries]

All courts shall be open, ...and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

B. STATUTES:

1. UTAH CODE ANN. §78-22a-2 [Foreign Judgment Act]

(1) As used in this chapter, "foreign judgment" means any judgment, decree, or order of a court of the United States or of any other court whose acts are entitled to full faith and credit in this state.

(2) A copy of a foreign judgment authenticated in accordance with an appropriate act of Congress or an appropriate act of Utah may be filed with the clerk of any district court in Utah. The clerk of the district court shall treat the foreign judgment in all respects as a judgment of a district court of Utah.

(3) A foreign judgment filed under this chapter has the same effect and is subject to the same procedures, defenses, enforcement, satisfaction, and proceedings for reopening, vacating, setting aside, or staying as a judgment of a district court of this state.

2. UTAH CODE ANN. §30-3-5(7)(g)(i) [Alimony Modification]:

The Court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.

## VII. STATEMENT OF THE CASE

### A. NATURE OF THE CASE

This is an alimony enforcement case in which Plaintiff domesticated her entire foreign decree of divorce in a Utah district court. After giving notice of the entry of foreign judgment in Utah, Plaintiff sought additional relief. Defendant, a Utah resident, wanted to tell his side of the story, why he should not be held in contempt now (or in the future) or pay his ex-wife's attorneys fees, and why he could not pay the alimony awarded by the California court due to a material change in circumstances (bankruptcy of purchase of his chiropractic practice build up over a lifetime). The district court judge held that Defendant could not be heard on a modification request, holding that the Utah court lacked subject matter and personal jurisdiction.

### B. COURSE OF PROCEEDINGS AND DISPOSITION IN LOWER COURT

Plaintiff/Appellee Dorena Bankler (hereafter "Ex-Wife") obtained a decree of divorce from Jack Bankler, Defendant/Appellant (hereafter "Ex-Husband") entered on or about December 5, 1991 in Superior Court (San Bernardino County), [Record, p. 1, "Judgment of

Dissolution"]. Ex-Wife later sought to collect what she claimed to be unpaid alimony and obtained extension of alimony from October 1, 1995 through September 30, 1999, through an "Order After Hearing", issued by the above California Superior Court on or about April 2, 1996. [Record, p. 11, "Order After Hearing."] Ex-Husband was not present at the California hearing. He had moved to Utah and because of a bankruptcy of the party he had sold his business and was unable to pay alimony and had a material change in circumstances. Tr 6: 13-24; Record, p. 29, pg. 5 (Verified Petition to Modify Decree Divorce).

Ex-Wife then domesticated the case in the Fifth Judicial District Court, Washington County, Utah and sought not only enforcement of the California judgment but also an order to show cause (Record p. 22-24) and request for attorneys fees in the Utah Court. See also Record pp 16-17, "Notice of Filing Foreign Judgment" and Record pp. 18-21, "Motion for Order To Show Cause" and "Affidavit In Support of Order to Show Cause". Ex-Husband sought equitable relief in the same Utah case by filing a Verified Petition to Modify Decree of Divorce Record p. 28 and served same on Ex-Wife. Record pp 33-35. Ex-Wife objected. Record. p. 49, "Answer." After briefing and argument, the Utah District Court dismissed Ex-Husband's Verified Petition for lack of subject matter and personal jurisdiction, acknowledging full faith and credit for

the California alimony judgment, for the California-based Ex-Wife, while refusing to accept jurisdiction in that same case as to claims raised by the Utah-resident Ex-Husband before that same Utah court on alimony issues arising out of the Decree which Ex-Wife domesticated in Utah. Record p. 54, "Order of Dismissal."

Ex-Husband then filed his Notice of Appeal to this Court. Record p. 57.



#### VIII. SUMMARY OF ARGUMENT

Appellant maintains that he, a Utah resident, should have at least as much of a right to defend himself as Appellee, a California resident, has to prosecute him in a Utah district court. This is especially so after Appellee chose the Utah district court to domesticate not only the one-year alimony award which had been, reduced to judgment in California, but instead domesticated the entire Judgment of Dissolution [See Record, p. 16], thereby rendering the Utah Foreign Judgment Act applicable to the entire decree of divorce. The U.F.J.A. renders a foreign judgment filed under the Act subject to the same procedures, defenses, reopening, setting aside, etc. as a judgment of a district court in Utah. See U.C.A. §78-22a-2(3). The lower court should have allowed Appellant to defend against a show cause order and attorneys fees award brought in addition to an enforcement action, and should also have allowed Appellant to file a Verified Petition To Modify Decree of Divorce, since the entire decree of divorce was now fully domesticated under the U.F.J.A. Instead the district court held that it lacked both subject matter and personal jurisdiction to allow such a "re-opening".

Appellant believes the Utah Court gave the out-of-state party more "full faith and credit" than it offered him, denied him access

to the Courts in violation of UTAH CONST. Art. I §11; violated his due process by not allowing him an opportunity to be fully heard on why he could not pay the alimony sought by Appellee, and in giving a California resident access to courts and due process and denying him his, also violated his due process, equal protection, and privileges and immunities under the Fifth and Fourteenth Amendment to the Constitution of the United States.

All Appellant seeks here is an opportunity to be heard in his own state court on the same matter that his Ex-Wife brought against him in his own state court.

## X. ARGUMENT

### A. APPELLEE SUBJECTED HERSELF AND HER ENTIRE DECREE OF DISSOLUTION BY CHOOSING TO DOMESTICATE THAT DECREE IN UTAH DISTRICT COURT

Plaintiff-Appellee Dorena Bankler, ex-wife of Defendant-Appellant Jack Bankler (hereafter "Ex-Wife" and "Ex-Husband", respectively), is a California resident. Ex-Husband is a Utah resident. Ex-Wife sought enforcement of part of a prospective alimony award [record at 11:22-25] in Utah. However, rather than limiting her enforcement to past unpaid alimony, Ex-Wife domesticated her entire California Decree of Dissolution in the Fifth District Court in and for Washington County, State of Utah. Record, p. 16. Ex-Wife thus domesticated far more than a mere enforcement order. Then Ex-Wife sought an Order to Show Cause in Utah [Record, p. 18] and request for Attorneys Fees [Record, p. 23].

Ex-Husband Jack Bankler had good reason why he had not paid alimony and could not pay alimony in the future. See Record at 28, et seq., Verified Petition to Modify Decree of Divorce, wherein Ex-Husband under oath explains why he is not receiving the funds from sale of his chiropractic business [bankruptcy of his debtor-assignee]. This is a material change of circumstances. Mr. Bankler believed he should be able to explain that to the Court and

modify the now fully domesticated decree of dissolution.

## 2. UTAH FOREIGN JUDGMENT ACT

By domesticating the entire California decree of dissolution in the Utah district court pursuant to the Utah Foreign Judgment Act, the entire decree became subject to Mr. Bankler's re-opening the question of alimony, under provisions of that same Act.

The Utah Foreign Judgment Act holds, at U.C.A. §78-22a-2(3), that

A foreign judgment filed under this chapter has the same effect and is subject to the same procedures, defenses, enforcement, satisfaction, and proceedings for reopening, vacating, setting aside, or staying as a judgment of a district court of this state. [Emphasis added].

Appellant sought to reopen the decree of dissolution by way of his Verified Petition to Modify Decree of Divorce. Under the clear language of the U.F.J.A., he should have been able to.

## 3. FULL FAITH AND CREDIT AS APPLIED DOES NOT NEGATE APPELLANT'S CLAIM TO JURISDICTION IN UTAH COURT

In the Order Of Dismissal [Record, 54] the district court judge stated that the lower court "has jurisdiction to give full faith and credit to the Judgment entered by the California Superior Court which has been domesticated in the above-entitled Court." Appellant does not dispute that foreign judgments should be given full faith and credit, but they should not be given more than full faith and credit. A Utah decree which is what the California

decree became upon Ex-Wife's compliance with the Utah Foreign Judgment Act, should also be given at least as much faith and credit as the California decree. If not, there arises an Equal Protection problem, to say the least.

This raises the question, "is jurisdiction proper then in two venues at once?" Appellant suggests that it is, if the parties invoke multiple jurisdiction under a lawful foreign judgment act. Appellant is not seeking to set aside the California decree under Rule 60(b), U.R.C.P., for any reason. He is merely seeking to respond to the broad issues raised not by him but by Ex-Wife when she chose to use the Utah Court not only to enforce a limited judgment of past alimony award but to domesticate her entire decree, and then go even beyond that and seek a new contempt order and a new attorneys fee award in Utah.

The U.F.J.A. appears to be subject to interstate uniformity of enforcement under U.C.A. §78-22a-8:

This chapter shall be construed to effectuate the general purpose to make uniform the law of those states which enact it.

Thus the U.F.J.A. appears to be a form of statutory full faith and credit. Appellant accordingly relies on the U.F.J.A. to afford him the privileges and immunities of United States citizenship, including being given full faith and credit in his own forum when a non-resident attacks him in his own state.

4. PERSONAL JURISDICTION ALSO ATTACHED WHEN EX-WIFE CONSENTED TO USE UTAH COURTS, DOMESTICATED HER ENTIRE DECREE OF DIVORCE, AND WAS THEN DULY SERVED PROCESS BY EX-HUSBAND ON HIS MODIFICATION PETITION

The court had subject matter jurisdiction over the Petition to Modify because of Ex-Wife's domestication in Utah of the entire decree, as analyzed elsewhere. The Court had personal jurisdiction over Mr. Bankler, Ex-Husband, because (1) he was a Utah resident; (2) the act complained of arose in Utah and applied to Ex-Wife, thus establishing "minimum contacts". (See Arguello v. Industrial Woodworking Mach. Co., 838 P.2d 1120 (Utah 1992), and because Ex-Wife consented by bringing foreign decree. Furthermore, Ex-Wife Dorena Bankler was personally served in Utah by Gary Stubbs, a licensed process server. See Record, p.35 (Return of Service), and p. 49 (Ex-Wife's Answer to Petition to Modify Decree of Divorce).

B. THE LOWER COURT'S DENIAL OF JURISDICTION RE: APPELLANT'S PETITION TO MODIFY ALSO ABRIDGED APPELLANT'S RIGHTS TO OPEN COURTS UNDER UTAH CONSTITUTION

The Utah Constitution, at Art. I, §11, states:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Appellant Jack Bankler was entitled to reopen the issue of

alimony in the Utah Court after his Ex-Wife chose to domesticate her entire decree of dissolution in the Utah district court. (See Utah Foreign Judgment Act, supra, at IX-A-2 above).

As established earlier, Mrs. Bankler's domestication of her entire divorce decree enables Mr. Bankler to re-open that decree, and modify the alimony obligation in light of his changed circumstances.

This fact situation differs from that found in Holm v. Smilowitz, 840 P.2d 157 (Utah Ct.App. 1992). In Holm, a Utah court erroneously denied her motion for relief of judgment through a Rule 60(b) motion. In Holm the commissioner and district court erred in enforcing an Ohio order which had not been properly domesticated in Utah, contrary to the facts in the instant case.

However, Holm is applicable to the extent that since Appellant did comply with the U.F.J.A., the Utah court should exercise jurisdiction and should allow Appellant a remedy. The Utah Court of Appeals in Holm made it clear that "two states may have simultaneous concurrent jurisdiction" (Holm at 3).

Simply because California has concurrent jurisdiction on the matter Ex-Wife elected and consented to domesticate in Utah is not a valid reason to deny Appellant his access to the courts in his home state--Utah--especially on issues arising out of the same decree of divorce which Ex-Wife chose to domesticate in Utah, when

she could have left the divorce decree in California and simply domesticated her back-alimony judgment, obtained in California.

C. THE LOWER COURT'S REFUSAL TO EXERCISE JURISDICTION OVER APPELLANT'S PETITION TO MODIFY ALSO DENIED HIM DUE PROCESS, EQUAL PROTECTION, AND PRIVILEGES AND IMMUNITIES UNDER THE CONSTITUTIONS OF THE UNITED STATES AND OF UTAH

1. Due Process Denial

The Constitution of the State of Utah holds, at Article I §7, that "no person shall be deprived of life, liberty, or property, without due process of law."

The term "Due process of law" means, among other things, that a party "shall have his day in court." Jensen v. Union Pac. Ry., 6 Utah 253, 21 P.994 (Utah 1889). Further, Appellant was at risk of losing both liberty and property through Ex-Wife's Order to Show Cause brought in Utah after domesticating her Decree of Dissolution in Utah. [Record, p. 22 "Order to Show Cause."] Alimony and attorneys fees sought are certainly "property;" thirty day jail sentence against Appellant [Nov. 15, 1996 Tr. 7:4-5] is certainly a "liberty" interest.

In the instant case, Appellant was denied his day in court when the Court dismissed his Petition to Modify Decree of Divorce for lack of jurisdiction, and subjected Appellant to jail and monetary loss without a chance to show why changed circumstances



justified "reopening" of the alimony award in the decree of dissolution domesticated under the U.F.J.A. by Appellee.

Likewise, Appellant's rights under the United States Constitution, amends V and XIV, were abridged for the same reasons and under the same basic analysis. Amendment V states that "no person shall...be deprived of life, liberty, or property, without due process of law." Amendment XIV makes the above applicable to the States in Sec. 1: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

By denying Appellant jurisdiction to have his day in court to refute Appellee's contentions that he was still able to pay the alimony awarded in 1990 in California, and making him subject to incarceration and attorneys fees, the Utah lower court denied Appellant's fundamental property and liberty interest.

## 2. Denial of Equal Protection

...nor shall any State....deny to any person within its jurisdiction the equal protection of the laws.

CONST. UNITED STATES amend, XIV.

In the instant case, the lower court gave full faith and credit to a California resident who brought her entire case to Utah, and denied the Utah resident defending against that case a chance to re-open the Domesticated Decree of Divorce. Appellee had her day in court, but Appellant did not have his day in court,

despite the clear language of the U.F.J.A..

The parties were not treated equally. The reason they were not treated equally arose out of their residences in different states. Out-of-state residency can be a "suspect classification" for equal protection analysis purposes. In Shapiro v. Thompson, 394 U.S. 618, 22 L.Ed.2d. 600, 89 S.Ct. 1322, the Supreme Court held as unlawful a residency requirement for a party to obtain public assistance benefits because the classification inhibited movement between the states. The reasoning in Shapiro is that there is no second class citizen status on account of state residency. Citizens of California and Utah should be treated equally where there is state action. By hearing the out-of-state Appellee's complaints but denying jurisdiction to the Utah resident's defensive pleadings, the lower court denied Mr. Bankler his Constitutionally-mandated equal protection of the laws.


X. CONCLUSION

The lower court, in denying Appellant jurisdiction to reopen a domesticated decree of divorce, erred. The lower court also erred because the consequences of its dismissal of Appellant's Verified Petition to Modify Decree of Divorce also denied Appellant his rights to open court, due process, and equal protection under the Constitutions and laws of both the State of Utah and of the United States.

Appellant seeks correction of this error, and respectfully requests that the Appellate Court reverse the dismissal and remand the case back to the Fifth District Court in and for Washington County with instructions to allow him to proceed on his Petition to Modify Decree of Divorce.

Respectfully submitted this 2<sup>nd</sup> day of September,  
1997.

HUNTSMAN & CHRISTENSEN

  
R. CLAYTON HUNTSMAN  
Attorney for Defendant and  
Appellant

XI. NOTICE OF NO ADDENDUM

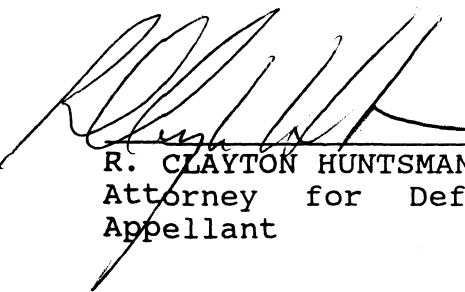
This Brief contains NO ADDENDUM.

The three court transcripts and entire court record have been forwarded to the above-entitled court by the court reporter and the trial court clerk, respectively.

CERTIFICATE OF SERVICE BY MAILING

I do hereby certify that on the 2<sup>nd</sup> day of September, 1997, I mailed two true and correct copies of the above and foregoing BRIEF OF APPELLANT, including Notice of No Addendum, by placing same in the United States Mail, first-class postage prepaid, to the following, to wit:

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